The Role of the Courts

The Issue

America's Founders believed that the purpose of government is to secure inalienable rights such as life, liberty, and the pursuit of happiness, and they designed a system of government to further that purpose. This system limits government in several ways, such as separating government power into three branches, with checks and balances between then, and dividing it between the federal and state levels of government.

The design of this system of government helps define the role of each of its components, and those roles must be maintained for the system to achieve its purpose. To this end, not only is power separated into the three branches and divided between the federal and state levels, but the Constitution also gives separate and distinct powers to each branch. Alexander Hamilton wrote that the exercise of these powers would involve will (the legislative branch), force (executive), and judgment (judicial). Since the judicial branch is limited to using judgment in interpreting and applying the law to decide individual cases, Hamilton explained, it would be the "weakest" and "least dangerous" branch. This separation of powers, in both theory and fact, is so important, he wrote, that liberty itself depends on it.

As the Supreme Court explained in 1795, the Constitution contains "the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature." Some cases therefore require that the court evaluate whether laws enacted by the legislative branch are consistent with the Constitution, a process often referred to as "judicial review."

While the *Marbury v. Madison* (1803) decision established the practice of judicial review, it did not relieve the legislative and executive branches of their independent responsibility to evaluate the constitutionality of their own actions. For example, when Congress makes a decision about which laws to enact, it is interpreting the Constitution. When Members of Congress reject legislation that would violate the Constitution, they are acting in accordance with their oath.

Similarly, the President carries out this oath by determining which bills to sign into law. The President may sign or veto legislation for political or policy reasons, but faithfully discharging his oath may also require vetoing legislation he believes would violate the Constitution. He (or she) may also choose not to enforce a law signed by one of his predecessors if he concludes that it is unconstitutional. The responsibility

of each branch to ensure that its actions are consistent with the Constitution is always a present duty.

America's Founders designed a system of government in which the judiciary must exercise its judicial power, especially judicial review, in a particular way, and not as the sole actor. With the Supreme Court taking the lead, however, the judicial branch has recently been pushing past those limits and has expanded its power beyond the design intended for it. In *Cooper v. Aaron* (1958), for example, the Court asserted that "the federal judiciary is supreme in the exposition of the law of the Constitution."

This trend has had several effects that undermine the liberty our system of government was designed to provide. It has, for example, invited the other branches to ignore their independent duty to abide by the Constitution, and to act as though they are free to do what they choose, in whatever manner, unless or until stopped by the courts.

Not only has the judiciary proclaimed its superiority to the other branches in interpreting the Constitution, but it has also radically changed how it conducts that interpretation. Founder James Wilson, a signer of both the Declaration of Independence and the Constitution and one of the original six Supreme Court justices, explained that, in a republic, "the people are masters of the government." As a result, President George Washington said in his 1796 farewell address, the "basis of our political systems is the right of the people to make and to alter their constitutions of government." And, returning to *Marbury*, the Supreme Court emphasized that the Constitution is written so that the limits it imposes on government "may not be mistaken nor forgotten."

If these principles are true, then they should direct how judges go about interpreting and applying the law: A judge should use the Constitution, as written and originally understood, to conduct judicial review, and not a constitution of the judge's own making, with the meaning a judge wants it to have. Judges are limited, as the Supreme Court said in *Marbury v. Madison*, to "say[ing] what the law is," and the Constitution is not, as Chief Justice Charles Evans Hughes would say a century later, "whatever the judges say it is."

These principles apply as much to the judicial branch as to the other two branches. Judges therefore may not treat the Constitution in a way that takes control of the Constitution away from the people. For this to be a "government of laws and not of men," as John Adams put it, the law, not judges themselves, must decide the cases and controversies that come before the courts.

In determining whether a contested law is consistent with the Constitution, judges act within their proper judicial power when they give effect to the original public meaning of the words and phrases of laws and the Constitution. A law's compliance with the Constitution is no guarantee of its soundness or wisdom. In fact, judges acting in accordance with their constitutional duties will at times uphold laws that may be bad

policy, while striking down laws that may be good policy. Judicial review requires the judge to determine not whether a law leads to good or bad results, or accords with his or her personal views or priorities, but *whether that law violates the Constitution.*

The opposite approach is often called "judicial activism," in which judges use whatever process or method necessary to achieve their desired result. This approach might be described as "the political ends justifying the judicial means." A judge who employs judicial activism might ignore the law's text or its original public meaning, relying on external sources such as foreign law, and might even fail to apply the law impartially. This is also sometimes called "living constitutionalism," a theory in which the meaning of the Constitution itself evolves and changes, not through the amendment process set out in the Constitution itself, but as a result of judicial decisions driven by the priorities and preferences of judges.

The following examples of Supreme Court activism, which involved high-profile issues, have garnered significant media attention:

- *Fisher v. University of Texas at Austin II* (2016), which, rather than requiring the university to meet the strict standards of the Constitution's guarantee of equal protection, allowed it to discriminate against prospective white and Asian-American students.
- *Whole Woman's Health v. Hellerstedt* (2016), in which the Supreme Court, going beyond constitutional issues to make policy decisions, overturned Texas' reforms of substandard abortion clinics, acting as it did so as "the country's ex officio medical board," as Justice Clarence Thomas wrote in his dissenting opinion.
- In upholding the IRS's extension of tax credits to the federal health care exchange established pursuant to the Affordable Care Act in *King v. Burwell* (2015), the Supreme Court contorted the plain text of the statute to uphold President Barack Obama's signature legislative achievement for a second time.
- *Obergefell v. Hodges* (2015), which recognized a constitutional right to same-sex marriage with a decision that even supporters of the ruling have described as unintelligible and poorly reasoned.

In contrast, a judiciary exercising its power as designed would decide each case in light of what the Constitution and the statutes say, and what they originally meant, applying them impartially to the facts. Such judges respect the American people's right to control the Constitution, to elect representatives who enact statutes, and to remain masters of the government.

Recommendations

Policymakers should pledge to promote the appointment of constitutionalist judges. Policymakers should pledge to promote the appointment of judges who will follow the design for the judiciary by interpreting the law as written and impartially applying it to decide cases. This means that the President should nominate—and Senators should confirm—only faithful constitutionalists.

Senators should prioritize determining whether judicial nominees will be committed to the judiciary's role as designed. In exercising their "Advice and Consent" role, which is a check on the presidential power to appoint new judges, Senators must determine whether nominees are qualified for judicial service. These qualifications include not only appropriate legal experience, but also the proper judicial philosophy. Senators should seek to determine a nominee's understanding of the power and proper role of the courts in our system of government, and the process or method a nominee will follow to interpret and apply the law in their cases.

Questions such as the following should inform the confirmation process: Does the nominee decide cases involving specific parties and particular facts, or does he or she address issues and solve broad problems? Does the nominee believe in interpreting the Constitution according to the original public meaning of its text, or does he or she believe that new meaning can be found from other sources, including foreign law? Ought judges to take into account the political interests that might be served by their decisions?

Senators should not abuse their role of "Advice and Consent." The Senate advises whether the President should appoint someone he has nominated by giving or withholding consent. This does not mean, however, that the Senate has a co-equal power of appointment; and the Senate should not use procedural tactics that effectively highjack the President's power to appoint judges.

Facts and Figures

FACT: Courts with judges who serve unlimited terms have a total of 860 seats around the country.

- The Constitution gives Congress two categories of authority to create federal courts. Judges on courts established under Article I serve for specific terms. Those on courts established under Article III do not have specific terms, serving "during good Behaviour."
- Article III judges are nominated by the President and must be approved by the Senate.
- Today, the U.S. District Court has 663 seats, the U.S. Court of Appeals has 179, the U.S. Supreme Court has nine, and the U.S. Court of International Trade has nine, for a total of 860 seats on Article III courts.

FACT: On average, judicial appointments barely exceed new judicial vacancies.

- Judges on Article III courts serve for an average of 22 years, long past the presidency during which they were appointed.
- During the past two decades, an average of 42 vacancies have occurred each year on Article III courts, three-quarters due to judges leaving their positions and the remainder due to either death or appointment to a different position.
- Since 1981, presidents have appointed an average of 45 judges per year.

FACT: Judicial vacancies have remained a problem, compromising the judiciary's ability to serve its purpose.

- Vacancies on Article III federal courts remained in triple digits for 32 straight months, from January 2017 through August 2019, the longest period in three decades.
- The percentage of these vacancies designated "emergencies" by the Administrative Office of the Courts because of their length and impact on caseloads was the highest in 20 years.
- The lower courts have the last word on most federal cases because the Supreme Court decides only about 80 cases per year, half as many as two decades ago.

Additional Resources

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"Supreme Consequences: How a President's Bad Judicial Appointments Threaten Your Liberty" (Washington, The Heritage Foundation: 2016) https://thf_media.s3.amazonaws.com/2016/2016030125RoleofCourts.pdf.

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Elizabeth Slattery, "How to Spot Judicial Activism: Three Recent Examples," Heritage Foundation *Legal Memorandum* No. 96, June 13, 2013, http://www.heritage.org/research/reports/2013/06/how-to-spot-judicial-activism-three-recent-examples.

Thomas Jipping, "Judicial Appointments During the 115th Congress," Heritage Foundation *Legal Memorandum* No. 244, May 15, 2019, https://www.heritage.org/sites/default/files/2019-05/LM-2440.pdf.